No. 2672

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST,

Plaintiffs in Error,

vs.

TAGGART ASTON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

JACOB M. BLAKE,
Attorney for Defendant in Error.

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Statement.

This is an action for *malicious* libel. For a great number of years and during the successive terms of office of a number of Secretaries of the Interior, or as far back at least as the period of incumbency of Secretary Hitchcock, the City of San Francisco had made repeated and futile efforts to obtain from the Department of the Interior a franchise or right of way for a dam-site and reservoir privilege in the Hetch Hetchy Valley in the High Sierra Mountains in California for use as a source of domestic water supply. The Hetch Hetchy Valley is in what is known as the Upper Catchment basin of the Tuol-

umne River. In 1908 the then Secretary of the Interior (Mr. Garfield) issued a permit entitling the city to impound water in that catchment by first developing the drainage area tributary to Lake Eleanor and Cherry Creek, and second, after a full development of these sources, to utilize the Hetch Hetchy site (Trans. pp. 98, 99). In 1910 Secretary Ballinger caused a show cause order to be issued and served upon the city requiring it to show "why the Hetch Hetchy Valley should not be eliminated from said permit" (referring to the Garfield permit) and the order was made returnable on or before May 1, 1910. On May 27, 1910, an order of continuance was made by the Secretary which, among other things provided as follows:

> "Said continuance and postponement is granted for the purpose of enabling said City and County of San Francisco, to furnish necessary data and information to enable the Department of the Interior to determine whether or not the Lake Eleanor basin and watershed contributary, or which may be made contributary thereto, together with all other sources of water supply available to said city, will be adequate for all present and reasonably prospective needs of said City of San Francisco and adjacent bay cities without the inclusion of the Hetch Hetchy Valley as a part of said sources of supply and whether it is necessary to include said Hetch Hetchy Valley, as a source of municipal water supply for said City and County of San Francisco and bay cities.
>
> "In granting said postponement and continuance it is understood said City and County of San Francisco will at once proceed, at its own expense and with due diligence, to secure and furnish to said Advisory Board of Army Engi-

> neers all necessary data upon which to make the determination aforesaid, and pending the hearing upon said order to show cause, no attempt shall be made by said city or any of its officers or agents to acquire, as against the United States, any other or different rights to the Hetch Hetchy Valley than it now has under said permit, and that no effort shall be made by said city to develop said Hetch Hetchy Valley site'' (Trans. pp. 107-108).

Prior to this time and at the request of Secretary Ballinger, the War Department had detailed three army engineers to advise and report to the Secretary of the Interior concerning the data that should be furnished in connection with the city's application to be allowed a full franchise for the use of the Hetch Hetchy Valley, and they had been directed to open an office at San Francisco to receive the engineering reports of the city *as and when they were completed* (Trans. pp. 104 and 105). By reason of the various continuances granted, the hearing upon the show cause order was not had until November 25-30, 1912, when the then Secretary, Mr. Fisher, refused to take any action upon the report of the Army Board or upon the reports and data furnished by the city on the ground, among others, that Congress alone had the exclusive power and jurisdiction to grant the irrevocable rights of way and franchises such as were contemplated in the Garfield permit. The City of San Francisco then proceeded to Congress with its application and at the special session convened in the spring of 1913 exerted its full resources in securing the passage of what is now known as the

Raker Bill, being the House Bill, as amended, for an Act of Congress granting exclusive dam-site, reservoir and power privileges to the city at Lake Eleanor, Cherry Creek and in the Hetch Hetchy Valley.

The Raker Bill was before the House Committee on Public Lands for public hearing in June and July, 1913, and having passed the House that summer, came before the Senate for debate upon final passage in December, 1913. On December 2, 1913, as found by the verdict, the defendants caused to be printed, published and circulated in the City of Washington, D. C., a special Washington edition of the San Francisco Examiner for the purpose of influencing the action of Congress in favor of the passage of the Hetch Hetchy Bill. The paper contained no reading matter of any description whatsoever which did not have for its object and purpose to create a feeling in the minds of Senators favorable to the application of the City of San Francisco for the special franchise and privileges that it was seeking in the Hetch Hetchy. It was this issue which contained the matter found by the jury to be libellous, and which is as follows:

> INSPIRATION OF OPPOSITION.
>
> "During the Senate Committee hearing it came out that much of the inspiration for gross and careless aspersions made on the City of San Francisco, the army engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply to sell to San Francisco.

> "But at the House hearing it had been so thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very angry when Sullivan was referred to as his friend, though he admitted receiving the information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston" (Trans. p. 114).

In the same issue and in close proximity with the foregoing there appeared a most scandalous attack upon the Mr. Sullivan whose name appears in the libel (Trans. pp. 111-114).

The complaint pleaded the particular matter charged to be libellous in connection with the following innuendoes:

> "That by the use and publication of said words and language used and published by said defendants, and each of them as aforesaid, on the seventh page of said special Washington edition of said newspaper and opposite the publication of the words and language heretofore set out charging the said Eugene J. Sullivan to be 'a thief' and 'a man who ought to be in the penitentiary', they and each of them intended to charge and assert, and to be understood as charging and asserting, and were by the readers of said newspaper in fact understood as charging and asserting that this plaintiff was guilty of the fraudulent intent, purpose and design to combine and conspire with the said Eugene J. Sullivan to perpetrate a gross fraud upon the City of San Francisco by and through the sale to said city of a worthless opposition water supply and that said plaintiff did pretend to have such opposition water supply to sell to said city and that, because he pretended with said Sullivan to have such opposition water supply to sell to said city he was led to and did

make gross and careless aspersions on said city of San Francisco, the advisory board of army engineers and engineers generally (meaning thereby to refer to the statements that had been made before various congressional hearings, upon the authority of plaintiff concerning the suppression of said Bartell-Manson Report by said City of San Francisco).

"That this plaintiff had been proved at the hearing before the Committee on Public Lands of the House of Representatives to be guilty of combining and conspiring with said Eugene J. Sullivan to perpetrate and of perpetrating a gross fraud either upon said committee, or upon the House of Representatives, or upon Congress, or upon the City of San Francisco, or upon some other person or persons, corporation or corporations, public or private, heretofore unnamed.

"That this plaintiff was the tool, sycophant or hireling of said Eugene J. Sullivan, and, therefore, of 'a thief' and 'of a man who ought to be in the penitentiary' and that as such he would stultify himself and prostitute his personal honor and professional reputation to do the servile bidding of such an employer without reference to Truth and Right; and that he had so demeaned himself and disgraced his profession in a certain course of conduct with one Mr. Johnson (meaning Robert Underwood Johnson of New York City), by lying and misrepresenting facts in connection with the Hetch Hetchy project at the bidding and behest of the said Sullivan" (Trans. pp. 56, 57).

All of the references to Mr. Sullivan and Mr. Aston in the special Washington edition of the San Francisco Examiner were veiled so far as any indication being given as to the nature of their alleged misconduct in general or to their connection

with any specific disclosures made by them to Congress concerning the suppression of any report or data that had been ordered submitted to the Army Board and to the Secretary of the Interior under the terms of the order of May 27, 1910.

This fact in connection with that already mentioned, viz., that the complaint alleged the libel to have been malicious, is most important as constituting the test by which the Court will determine the relevancy of proffered evidence, the admission of which the defendants now assign to have been error.

Bearing in mind then the scope of the action, a full comprehension of which can be best gathered from the inducement matter pleaded in the complaint, an examination of the record will show that full proof was made of the following salient facts:

In May, 1913, Eugene J. Sullivan and his wife, being the owners of all the issued capital stock of the Sierra Blue Lakes Water and Power Company except the shares necessary to qualify other directors, executed their power of attorney to Richard Keatinge and his son of San Francisco by which they were empowered to make a sale of said stock at their discretion; that thereupon these attorneys-in-fact gave a three months' option to Mr. W. J. Wilsey within which he might make a sale and delivery of the entire property and assets of the Sierra Blue Lakes Water and Power Company to some English and Continental clients (Trans.

pp. 167-172). Mr. Aston was employed as an engineer by Mr. Wilsey to make a report on the company's properties (Trans. pp. 174-181). Mr. Aston's report, which was completed in July, 1913, did not take into account any question of the value of the properties for resale to the City of San Francisco for a municipal water supply, but expressly excluded that notion (Trans. pp. 296-299), and the report was confined to the value thereof for development as a hydro-electric and irrigation project and for the sale of water for domestic supply to such interior towns as Sacramento, Stockton and others. Mr. Aston in his report in July was simply following out a policy which he had formed with respect to the development of these properties as early as the 8th of May, 1913, when he wrote Mr. Wilsey as follows:

> "It will be necessary to get San Francisco and Hetch Hetchy out of your associates' heads—the success of the project is not dependent on them" (Trans. p. 288).

Mr. Wilsey's option expired by limitation in August, 1913, and with its expiration Mr. Aston's direct interest in the property ceased. His indirect interest as an engineer on behalf of his employer, in purging the Mokelumne properties from the gross slanders that had been heaped upon them by engineers in the employ of the City of San Francisco is made to appear very clearly in the record. As an engineer he believed these properties were more valuable for the purpose of constructing

works than simply for buying them to sell to the city (Trans. pp. 240-244). In the latter part of May, Mr. Aston learned from Mr. Wilsey that a Parisian gentleman, Mr. Turck, who was contemplating presenting the Blue Lakes project to the consideration of Baron Reille, knew of the existence of the Freeman Report upon the San Francisco Water Supply and that the report included a report on the properties of Sierra Blue Lakes Water and Power Company (Trans. pp. 291, 292). On reference to the Freeman Report Mr. Aston learned what Mr. Freeman had said concerning the Mokelumne sources in part as follows:

> "The Mokelume River As An Alternative Source to the Tuolumne.
>
> "The Mokelumne is next in the order of proximity to the Tuolumne after the Stanislaus. The possibility of its use by San Francisco has several times been brought forward by promoters and has received some publicity thru the advertising of the claims by the Sierra and Blue Lakes Water Company, that it could provide the City of San Francisco with an adequate supply of water, coupled with an electric power project from which the income would pay a profit on the whole enterprise.
>
> "This Source Several Times Investigated for San Francisco and Rejected
>
> "The City Engineer, Mr. Manson, happened to have made brief studies and an adverse report on these Mokelumne sources six years previously, but conformably to the request of Secretary Ballinger began further investigations, comprising surveys of the principal reservoir sites named by the present promoters. Upon Mr. Manson's disability by illness, al-

ready referred to, the continuation of the Mokelumne investigation was turned over to Mr. C. E. Grunsky, who had himself studied this river as a possible source for San Francisco eleven years ago and also had been familiar with many of its features from boyhood, his early home having been in Stockton. Mr. Grunsky's full report, prepared in July, 1912, was filed with the Advisory Board of Army Engineers under date of August 1, 1912, in triplicate, comprising, with appendices, 174 typewritten pages and numerous tables and diagrams. The following is a very brief abstract of the report as filed. Copious extracts from it are presented in Appendix 18.

"In the report filed Mr. Grunsky notes that the possibility of supplying San Francisco from these sources was investigated by Col. G. H. Mendell (Municipal Reports 1876-77), and refers to his own investigation of 1901 and to that of these Mokelumne sources made for City Enginer Woodward in 1906.

"All of these previous investigations had so plainly brought out the disadvantages of the Mokelumne that Mr. Grunsky evidently was impressed with the unwisdom of spending any large sum of money at the present time for further field work in detail, and so bases his statement upon the facts already on record. Moreover, there was not time for any extensive new field work after Mr. Grunsky was called in to take up the work which Mr. Manson had not completed at the time of his illness. I have not visited this region myself, but have carefully reviewed the data presented by Mr. Manson and Mr. Grunsky. * * *

"To these I need only add that an inspection of the large scale map makes plain the fact that all of the advantages of dam-site, length of aqueduct, quality of storage reservoirs, future water power possibilities, and the great

> advantage of not having to seek some additional source, at a time when sources equal to those now available are impossible to obtain, are all so plainly and strongly on the side of the Hetch Hetchy and Upper Tuolume that I do not believe it advisable to expend the $15,000 to $30,000, more or less, which exploration and complete surveys for thoroughly working out the best possible project for a municipal water supply from the Mokelumne would cost'' (Trans. pp. 226-228).

After having made a personal survey on the ground of the Mokelumne sources, Mr. Aston knew that Mr. Freeman was either deliberately misrepresenting the facts or that he had been grossly misled by the officials of the engineering department of San Francisco. We come, therefore, directly to the significance of the discovery in June, 1913, of the suppressed Bartel-Manson report *which was completed in April, 1912,* and which should have been furnished as the report of City Engineer Manson made for that purpose to the Advisory Board of Army Engineers and by them to Secretary Fisher for use at the hearing of the show cause order in November, 1912. The facts surrounding the discovery of this suppressed report and the motives of Mr. Aston impelling him to disclose his discovery to the House Committee on Public Lands fully appears in Mr. Aston's letter to Senator Chamberlain of July 16, 1913 (Trans. pp. 245-252; see also Trans. pp. 229-232).

Without attempting to detail what the record shows in this behalf it will be sufficient to say that

when Mr. Aston became possessed of the Bartel-Manson Report in June, 1913, the House Public Lands Committee being at the time in public session and holding hearings upon the Raker Bill, he immediately communicated to the committee disclosing the existence of this report and he represented that it conclusively showed the availability of the Mokelumne River in the High Sierras as an adequate source of domestic water supply for the City of San Francisco when used in connection with Lake Eleanor and Cherry Creek under the Garfield Permit (Trans. 122-136).

Mr. Aston further represented to the Committee that this report had been made by and under the direction of the then City Engineer of San Francisco in April, 1912, in conformity with the order of the Secretary of the Interior to which reference has already been made; that, as emendated by the City Engineer in his own handwriting, the report on the Mokelumne River source carried the following significant statement almost exactly in the words used by the Secretary of the Interior in granting the continuance of the rule to show cause (Trans. pp. 122-136).

Following these words and figures, "the critical period August, 1907, to December, 1909, inclusive, equals 518 days, 224,408 divided by 518 equals *432 million gallons daily draft available to San Francisco,*" there was appended a notation in the handwriting of Mr. Manson in the words "*provided all rights and all reservoirs are secured and utilized,*

this source under this assumption is sufficient to meet the demands of the region about the Bay of San Francisco when re-enforced from a full development of Lake Eleanor, but the cost is manifestly prohibitive." Also, that at the same place in said report there was a further notation in the handwriting of Mr. Manson in the following words; "put in the capitalized value of the Sierra & San Francisco Power Company plus $6,000,000.00 Blue Lakes plus cost of developing 60 M. G. D. later given" (Trans. pp. 189, 190).

Mr. Aston then charged that this report was suppressed from the Army Board and the Secretary of the Interior, and that another and unfavorable report as to the availability of the Mokelumne source was afterwards prepared and submitted to the Army Board, showing only 60 million gallons per day available to San Francisco from this source.

We will not attempt to enlarge upon the significance of the fact that this suppressed Bartel-Manson Report was in existence at the time Mr. Freeman was led to make the representations in his report that the only data on the availability of Mokelumne sources was that of the obsolete character which he described, and that lack of time prevented the completion (?) of studies in the field which had been begun by Mr. Manson, but which had been interrupted by the latter's illness. The maps accompanying the photographic copy of the Bartel-Manson Report show they were all made between the years 1910 and 1912.

An attempt was made by the defense to show that the result of Mr. Bartel's studies were furnished the Army Board through the report of another engineer, C. E. Grunsky, employed by the city to take up the work after Mr. Manson's illness. The cross-examination of this gentleman at pages 351-363 will show the extent of their success in this regard. The diagram referred to as the Mokelumne River Drainage Area, period 1896-1900, and which was not given to the Army Board (Trans. p. 355) was the result of original work in the field by Mr. Bartel, and the significance of its being withheld lay in the fact that from it the Army Board would have been able to determine that there was available from 430 sq. miles in the upper Mokelumne river catchment, 366 million gallons of water per day to San Francisco (Trans. p. 395).

Mr. Grunsky, for the defense, having stated that all reports that he had made while in the employ of the city had reached the Army Board (pp. 334, 335) pursuant to the order of the Secretary of the Interior, it was shown on rebuttal by William Bade, Professor of Semetic Literature and Archeology in the Pacific Theological Seminary, that the Grunsky-Hyde-Marks report on the Alameda Creek run-off, a property of the Spring Valley Water Company, was withheld from the Army Board and from the Secretary until it was drawn out by Mr. Fisher at the hearing in November, 1912. This report was favorable to the

contentions of the Water Company as to the amount of water available from that catchment (Trans. pp. 380-386; see also pp. 372 and 373).

It is necessary to state that the so-called Bartel-Manson report on the Mokelumne River sources of water supply was never laid before Congress or any of its committees during the hearing upon the Raker Bill. Mr. Aston, not being in the employ of Mr. Sullivan in June and July, 1913—nor at any time—and Mr. Sullivan insisting on going to Washington in his own behalf, refused him the possession of the photographic copy of the report, trusting that an opportunity might be afforded him later to make full and complete scientific use of it in vindicating the properties and not Mr. Sullivan, for whom, however, he had a real sympathy as for a man with a just grievance. Mr. Sullivan's appearance before the House Committee on Public Lands was unfortunate, but it in no way justified the attack made upon him as having been shown to be a "thief and a man who ought to be in the penitentiary". One of the gratifying features in connection with the trial of this case is that we used Mr. Sullivan as a witness in behalf of the plaintiff; and we did this because, to say the least, it would have been unkind to have used the wholly unwarranted statements made against him for the purpose of giving the point to the libellous matter so plainly intended by its publication, and leave the inference that those statements were true. We not only offered Mr. Sullivan to the cross-examination of the de-

fendants, but we introduced *in toto* the record of the whole proceedings had before the House Public Lands Committee, when he was before it as a witness, and read such parts of it to the jury as in our opinion supported our case. The Court will recall the rule of evidence that makes the whole of such a record, when offered generally, equally available for use by both parties. We are glad to say that the defendants could not put a finger on a single word or sentence in the whole proceedings which would in any way justify the statements made against Mr. Sullivan in the issue of the paper in question. At the time of the trial Mr. Sullivan had allowed the statute of limitations to run against his right of action for libel, and this Court may be assured that counsel for the defendants exercised the greatest caution to avoid any reference to the article in question by way of derogation of Mr. Sullivan which in any way could be interpreted as a re-publication of their former charges against him.

Argument.

A. THE COURT DID NOT ERR IN ADMITTING PROOF OF THE STANDING OF THE PLAINTIFF AS AN ENGINEER IN THIS COUNTRY AND IN EUROPE.

The defendants depend upon the rule laid down in Davis v. Hearst, 160 Cal. 143, 185, to sustain their assignment of error in this connection, and in three separate places in their opening brief state with the

most solemn deliberation that the Supreme Court of California in the case mentioned passed upon and construed section 2053 of the Code of Civil Procedure of California. (Defendant's brief pp. 42, 43, 47.) At page 43 they say:

> "This Court is bound to assume that the Supreme Court of California in deciding Davis v. Hearst did so with reference to the provisions of section 2053 of the Code of Civil Procedure."

The vigor with which this is enforced upon the attention of the Court renders it imperative, in the interest of the plaintiff, to directly charge here, as we did below upon the argument of defendant's motion for a new trial, that such a representation is not borne out by the facts. The attention of the Court is called to the fact that the attorney of record for the plaintiffs in error here (the defendants below) has been engaged in the defense of Mr. Hearst's libel actions since at least as far back as December, 1896, the date of the reported decision in Taylor v. Hearst, 115 Cal. 394. The attorney of record here and one of the counsel whose names appear on the brief on file in this Court, were, respectively, attorney and counsel for Mr. Hearst in Davis v. Hearst. Both gentlemen *know* the fact to be that neither the record nor the briefs of counsel raise the question of the construction of section 2053 in the latter case. The oral argument of the attorney of record here, made in the Supreme Court of California, is extended in the printed public record together with the briefs. We must therefore

ask him to categorically deny, either orally at the argument or in writing, the statements both directly and inferentially made here that this section of the Code of Civil Procedure received the construction he contends for, or any construction, in Davis v. Hearst.

Except for the insistence with which counsel urge this assignment, we might well be content to rest upon the ruling of the trial Court denying the motion for a new trial upon the ground that the general objection to the admissibility of the testimony complained of was not sufficient to entitle them to an exception. This ruling followed the same representation made by us here concerning the unfairness of counsel in not advising the Court below of its familiarity with the ruling in Davis v. Hearst, and in failing to argue the point they now make, at the trial. The strength of the position taken by the learned trial judge is increased by the evidence of the industry and learning which counsel here display in attempting to support the assignment by reference to what they conceive to be a proper construction of section 2053. If they intended to rely here upon such a construction of the statute, obviously their objection below should have been put upon the ground that the evidence in question was inadmissible by reason of the statute.

In the trial of this case below the plaintiff by the allegations of his complaint, and the defendants *by their general denials,* put in issue the fact that the plaintiff was by profession a civil engineer who for

the past fifteen years had been continuously and actively engaged in the practice of his profession in different parts of the English speaking world, and was at all the times mentioned in the complaint thus engaged in the United States of America; that by the use and publication of the alleged libellous words, the defendants meant to charge, and to be understood as charging, that in the practice of his profession the plaintiff was the tool, sycophant, or hireling of one Eugene J. Sullivan, whom the defendants by the same publication had charged to be "a thief" and "a man who ought to be in the penitentiary", and that as such he, the plaintiff, would stultify himself and prostitute his personal honor and professional reputation to do the servile bidding of such an employer without reference to Truth and Right;

> "and that he had so demeaned himself and disgraced his profession in a certain course of conduct with one Mr. Johnson (meaning Robert Underwood Johnson of New York City), by lying and misrepresenting facts in connection with the Hetch Hetchy project at the bidding and behest of said Sullivan."

The questions propounded to the witness Wilsey, the admission of the answers to which is assigned as error under the rule in Davis v. Hearst, 160 Cal. at pages 185 and 186, are as follows:

> "Q. 18. State whether or not you know the general reputation of Taggart Aston in the engineering world, meaning thereby *among consulting engineers and among construction engineers and those* engaged in promoting and constructing *engineering* projects in this coun-

> try *and in Europe,* or in either of said countries, for the truth and veracity *of his engineering reports as a consulting engineer?"*

Having answered that he did, the witness was asked:

> Q. 20. "State what Mr. Aston's reputation is in the particulars inquired about in interrogatory No. 18, in any or all of the quarters aforesaid."

The answer was that it was good both in this country and in Europe.

We submit that this statement of the issues of fact made by the pleadings, and of the issue of law raised by the defendants' assignment of error, are wholly different from that set forth in the statement and argument of counsel to which this is a reply. The testimony sought to be illicited from the witness is not in any sense character testimony, that is to say testimony of general good character of that nature which the court is asked to rule is inadmissible on the plaintiff's case in chief and in advance of an attack upon it by the defendants under the authority of Davis v. Hearst.

The testimony given by the witness Wilsey was in support of particular allegations of the complaint put in issue by a general denial, and went to prove the extent and the peculiar nature of the injury to the plaintiff's professional reputation by reason of the alleged libellous publication. This testimony was relevant unless there is a rule of exclusion, of which we confess ourselves to be ignorant, which

prevents a plaintiff from proving the territorial limits to which his reputation runs and the nature of the injury to it, from a standpoint of professional considerations.

But if reputation for good character may not be considered to be put in issue in all actions for defamation under the provisions of section 2053, C. C. P., although by the express terms of the statute, "Evidence of good character" of a party is admissible when "the issue involves his character", until it is attacked, still there is no restriction, and in reason there can be none, against the parties putting in issue the plaintiff's good character; and that is exactly what the plaintiff and the defendants have done by the issues joined in this case.

We have little disposition to follow the learned counsel for the defendants through their attempt at a closely reasoned argument in support of the proposition that the rule laid down in Davis v. Hearst is the common law rule, and that section 2053, C. C. P., is to be construed as declaratory of the common law upon the subject, even though such a construction results in obliterating the second and disjunctive clause entirely from the statute. The argument not only involves several *non sequiturs,* but is also in the teeth of section 4, C. C. P., which declares that all of the provisions of the code are to be construed liberally, with a view to effect their objects and to promote justice; and therefore, without desiring to reflect upon the great legal acumen of our opponents we will dismiss all further con-

sideration of their able brief and proceed directly to a consideration of this very interesting question as it presents itself to our view.

In the first place it would seem that in matters of evidence as well as in matters of substantive law, the Federal Courts are bound "to give effect to the laws of the several states" whether dealing with questions of the competency of witnesses, or other rules relating to the nature and principles of evidence; also that "the laws of the several states" include the decisions of their highest Courts, in the matter of establishing rules with respect to evidence.

Nassau Savings Bank v. American L. M. & A. Co., 189 U. S. 221; 47 Law. ed. at 785.

But it is also well settled that, when the decisions of the highest Courts of the state are to be looked to for "the law of the several states", it is *"the settled law"* which must govern the Federal Courts, and in the absence of a settled rule of decision of the State Court construing a statute or the organic law of the state, the Federal Courts not only may, but it is their duty, to exercise an independent judgment touching the validity, interpretation, or scope of the state statute in question.

Gelpcke v. Dubuque, 1 Wall. 175; 17 Law. ed. 520;

Rowan v. Runnels, 5 How. 134; 12 Law. ed. 85;

Ohio Life Ins. Co. v. Debolt, 16 How. 416; 14 Law. ed. 997;

Havemyer v. Iowa Co., 3 Wall. 303; 18 Law. ed. 42;

Douglas v. Pike Co., 101 U. S. 667; 25 Law ed. 971;

Burgess v. Seligman, 107 U. S. 20; 27 Law. ed. 365;

Kuhn v. Fairmount Coal Company, 215 U. S. 349; 54 Law. ed. 233;

So. Pac. R. R. Co. v. Orton, 6 Sawy. 195; 32 Fed. 477-478.

In the case of Kuhn v. Fairmount Coal Co., the Court says:

> "We take it, then, that it is no longer to be questioned that the Federal Courts, in determining cases before them, are to be guided by the following rules: * * * 3. But where the law of the state is not thus settled, it is not only the right but the duty of the Federal Court to exercise its own judgment, as it always does when the case before it depends upon the doctrines of commercial law and general jurisprudence."

And again in the same case:

> "The Court took care in Burgess v. Seligman, to say that the Federal Court would not only fail in its duty, but would defeat the object for which the national courts were given jurisdiction of controversies between citizens of different states, if, while leaning to an agreement with the State Court, it did not exercise an independent judgment in cases involving principles *not settled* by previous adjudications." (The italics are ours.)

The jurisdiction of the Court in the action at bar rests upon the same constitutional provision as was

there under discussion, the plaintiff being an alien resident of the State of California.

At the oral argument we called the Court's attention to the fact that the question as to the right to prove general good character in the examination of the plaintiff's witnesses in chief in this class of actions, had arisen in but two cases in the Supreme Court of California; that the Court had ruled both ways upon the question, and in neither case was reference made to the rule established by the second and disjunctive clause in section 2053, C. C. P. The cases are Turner v. Hearst, 115 Cal. 394, at page 399, and Davis v. Hearst, *supra.*

In the former the Court held that

> "It was not error for the Court to allow proof of the extent of the plaintiff's practice",

where the plaintiff was a lawyer engaged in the practice of his profession, and where the words of the publication, admittedly libellous *per se,* affected the plaintiff's standing in his profession.

If, as would seem to be the case, it was not the intention of the Court in Davis v. Hearst to overrule Turner v. Hearst upon this point, the latter is the law of California where the question arises as it does in the case at bar.

In Davis v. Hearst, as we pointed out on the argument of the motion for a new trial, Mr. Justice Henshaw clearly purposes to recognize a distinction in the law between the case where general good character of the plaintiff may not be proved in his case in chief, and where good character or repu-

tation may be so proved when specially put in issue as in the case at bar; for he quotes as follows from Odgers on Libel and Slander, p. 366:

> "The plaintiff cannot give evidence of general good character in aggravation of damages merely, unless such character is put in issue on the pleading, or has been attacked by the cross-examination of the plaintiff's witnesses; for until then the plaintiff's character is presumed to be good."

A rule, we may say in passing, neither so sweeping nor so unreasonable as the one which counsel for the defendants seek to establish as that laid down in Davis v. Hearst. When Mr. Justice Henshaw's decision is read in the light of the publication charging the plaintiff Davis with "School Graft" that "Would Make a Ruef Blush" and of the fact as shown by the record that the answer raised the general issue, it will be readily seen that the learned justice overlooked the fact that the offer of the plaintiff to prove general good character for honesty and integrity was not broader than the particular issues raised by the pleadings, and that the case in that respect was not distinguishable from Turner v. Hearst. A careful examination of the whole record in Davis v. Hearst, and of the briefs of counsel, shows that this aspect of the question was never called to the attention of the Court, nor was section 2053, C. C. P., relied upon by the plaintiff to justify his offer to prove general good character in his main case. We say, therefore, that Davis v. Hearst, was not a case for the application

of the doctrine that general good character may not be proved until either it is impeached, or unless character is involved under the narrower construction which is claimed for section 2053; i. e. unless *good character* is specifically in issue on the pleadings.

The narrower construction is not the one, however, that the statute in question should bear. It will not be further contended by counsel for the defendants, in the light of what we have already said concerning their duty to this Court, that it has ever received such a construction by the California Courts, or that the second clause thereof has ever received any construction in an action in which the issue involved character. It is true that the counsel urges this Court is bound by the dictum expressed in Vance v. Richardson, 110 Cal. 414, to the effect that

> "Section 2053 of the Code of Civil Procedure is merely a concise statement of the rule that is to be found in the text books and judicial decisions;"

but that was a case of assault and battery where the Court correctly held that character evidence was as inadmissible under the statute as it was at common law.

The statute has received the notice of the State Court in People v. Vissellus Amanacus, 50 Cal. 233 and People v. Bush, 65 Cal. 129, both of which involved the impeachment of a witness; in Title Ins. Co. v. Ingersoll, 153 Cal. at p. 7, which was an action to enforce an alleged trust in the defendant,

who offered evidence in support of this character for truth, honesty, and integrity, and the Court held that

> "The issue in the case did not involve the character of the defendant as a party, * * * and no attempt had been made to impeach his character."

In Van Horn v. Van Horn, 5 Cal. App. at p. 721, the Court sustained the refusal to admit proof of good character of a defendant in a divorce case charged with adultery, in advance of its impeachment, on the ground that her character was not in issue. These are all the California cases on the subject.

We are, however, willing to be bound by the dictum of the Court in Vance v. Richardson, not only because, in our opinion, it declares correctly that section 2053 states the prevailing rule at common law upon the subject, but also because such prevailing rule at common law let in the proof of general good character in all cases where character is involved in the issues; e. g. in slander, libel, breach of promise, and seduction.

In Burnett v. Simpkins, 24 Ill. at p. 266, the Court says:

> "In actions for libel, slander, and the breach of marriage contract, the jury may, in assessing the damages, take into consideration the injury sustained by the plaintiff as well to the reputation and standing in society, as the situation of the parties. And no rule appeals more strongly to our sense of justice, or is more consonant with the principles of right, than that an

injury to the reputation of the good and virtuous, should be compensated in damages. And the proposition is too plain to be denied by any, that an injury to the character of a virtuous and good woman, is greater than that of one who is depraved and abandoned. To place the character of the two upon the same level, and to hold that an injury to the one is no greater wrong than to the other, is to confound all distinction between virtue and vice, the good and the depraved. That there ever has been and will continue to be a difference, is as obvious as that virtue is preferable to vice.

"No court has ever announced as a rule, in the assessment of damages, that a slander to the character of the low and depraved, is to be compensated by the same measure as if it had been inflicted upon the character of the good and upright. Such a rule can never prevail while any distinction is made in character. When all distinction is lost, then, and not till then, will the same rule, in measuring damages, be applied. In assessing damages for the breach of a marriage contract, the doctrine is well settled, that the jury may take into consideration all the injury sustained, whether it be from anguish of mind, from blighted affections, or disappointed hopes, as well as injury to character, immediately resulting from the breach of the promise. And this court has repeatedly held, that evidence of a seduction, the consequence of the marriage contract, may be given in aggravation of the damages. It will not be insisted that the breach of promise will occasion the same anguish of mind, or produce the same injury to the reputation of a prostitute, as to a pure and virtuous woman. Nor can a seduction result in the same injury to her character, as to that of a virtuous female. And these are proper considerations for the jury in estimating damages. If injury to the

> feelings and character of the party injured, could not be considered by the jury, there would be more plausibility in the position that evidence of bad character of the plaintiff could not be received in mitigation. But if the plaintiff may go outside of a mere pecuniary loss, and enhance the damages by showing mental suffering, loss of position and character, it would seem to follow that the defendant may show in mitigation the want of character, or one that is not above suspicion."

Another case, sustaining as a rule of common law, the right of the defendant to prove the bad character of the plaintiff in mitigation of damages under the general issue in an action of defamation, is Stowe v. Converse, 4 Conn. at pp. 41 and 42. The Court says:

> "It has been correctly said (Phill. Ev. 139) 'as evidence is confined to the points in issue, the character of either party cannot be inquired into, in a civil suit, unless put in issue by the nature of the proceeding itself.' Although it has been questioned, whether in an action for libel, the defendant may give in evidence, under the general issue, the plaintiff's character in mitigation of damages: (Foot v. Tracy, 1 Johns. Rep. 46) I entertain no doubt as to the admissibility of such testimony. 'The character of the plaintiff' said Ch. J. Kent, 1 Johns. Rep. 52-3 'must be considered as coming in, at least, collaterally, upon the trial,' 'and the injury to it is the gravamen complained of'. The plaintiff's character is the principal object attacked; and for the vindication of this specific injury, his suit is instituted; and in proportion to the fairness of his reputation, are damages sustained. Hence he comes prepared to support his character in order to deepen the proof of injury; and the defendant

> likewise, to protect himself from damages, makes his preparation to reduce to its proper standard that reputation which the parties, by their pleadings, have made an interesting question between them."

The same Court in the later case of Bennett v. Hyde, 6 Conn. at pages 26 and 27 after referring to the rule as laid down in Stowe v. Converse, says, in answer to the assignment of error that evidence of the good character of the plaintiff had been improperly received:

> "The plaintiff's character is not made the subject of inquiry, at the defendant's option, and shut out of view, or the subject of investigation, as shall best subserve the defendant's pleasure and interest. To a rule so inequitable, for the want of mutuality, the courts of this state have never acceded; but they have recognized and acted on the principle, that the final object of the plaintiff's suit, is the vindication of his character; and that his reputation of consequence, is put in issue by the nature of the proceeding itself."

The Court below in its decision denying defendant's motion for a new trial expressly held that the admission of the testimony, here assigned as error, was proper under the rule laid down in Taylor v. Hearst, *supra,* as touching the plaintiff's standing as an engineer; in other words, that it was not to be considered "character testimony" in the common legal acceptation of the term (Aston v. Examiner Printing Co. et al., 226 Fed. 496). Besides holding the rule concerning the admission of "character testimony" in actions of slander and

libel, as we contend it should be, the Courts of Virginia, West Virginia, Kentucky, North Carolina, South Carolina, Tennessee, Illinois, Connecticut and Massachusetts uphold the doctrine laid down in Taylor v. Hearst, and in Pennsylvania, the Court in Klumph v. Dunn, 66 Pa. St. 147, draws a distinction between the application of the rule denying the admission of testimony of general good character in advance of an attack as laid down in Chubb v. Gsell, 34 Pa. St. 114, and allows testimony of the plaintiff's standing in the community in which he lives; a distinction which we are free to confess that we can hardly follow.

The cases in the Federal Courts uniformly follow the rule laid down in Taylor v. Hearst, the best considered of which are

Press Pub. Co. v. McDonald, 63 Fed. 238;
Duke v. Morning Journal Assn., 128 Fed. 657.

The first case above mentioned contains a full discussion of the New York authorities and Judge Lacombe finds none of controlling weight that would prevent a Federal Court from receiving testimony of the plaintiff's "social standing" in an action for libel, and of his "social and business standing" in the other case cited. The rule in these cases, so much broader than is necessary to sustain the position of the plaintiff in the case at bar, has the implied sanction of the Supreme Court of the United States by reason of the fact that a writ of certiorari was denied by it in the last case (194 U. S. 632).

We respectfully represent that these cases are of prime authority, and we will not attempt to abstract their contents, assuming that the Court will desire to examine them for itself.

It seems to us that in view of the foregoing, there can be no doubt of the meaning that Mr. Field, or whoever it may have been that wrote the original section 1849 of the proposed Code of Civil Procedure for New York, from which section 2053 C. C. P., of California, is taken *verbatim,* had in mind, and that it was the intent of its author to establish the rule so clearly and decisively set forth in the cases to which we have referred. Defendant's contention would make the statute read that "evidence of good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, and unless the issue involves his (good) character". We respectfully submit that there is not an iota of authority to support such a contention; and, if there was, it would not shut out the proof offered by plaintiff here because the plaintiff's good professional character for the honesty and integrity of his engineering reports was put directly in issue by the pleadings.

Again we submit that this question is to be more properly tested by an application of the general principles of the law of damages than by a reference to principles governing the law of libel; and this is what Mr. Sutherland has to say upon the subject:

"The plea of not guilty puts in issue the general reputation of the plaintiff. The amount of his recovery will be affected by any evidence which supports or disparages that reputation. It is presumptively good when the trial begins, and until the presumption is overturned by proof. It is trite to say that what the law presumes, and so long as the presumption continues need not be proved; but where proof may add to what the law presumes or make specific what the law presumes only in a general way, and such addition and particularity may legitimately increase damages, it is admissible in the first instance to increase damages; *as in the case of the element of malice.* As the reputation of the plaintiff is in issue by the very nature of the proceeding, if the jury can estimate the damages with a more intelligent appreciation of the injury after they have heard affirmative evidence of the plaintiff's reputation than if the case is presented to them upon the mere supposition which the law raises that it is good, it is reasonable and proper such evidence be received." (The italics are ours.)

4 Sutherland on Damages (3rd ed.), pp. 3501-3502.

Other cases in support of the rule are:

Williams v. Haig, 3 Rich. Law (S. C.) 362; 45 Am. Dec. 774;

Adams v. Lawson, 17 Grat. 258;

Shayer v. Miller, 3 W. Va. 158;

Sample v. Wynn, Busb. (N. C.) 319;

Burton v. March, 6 Jones (N. C.) 409;

Romayne v. Duane, 3 Wash. C. C. 246;

Nellis v. Cramer, 86 Wis. 339;

Williams v. Greenwade, 3 Dana 432;
Larned v. Buffington, 3 Mass. 546;
Fountain v. Boodle, 3 Q. B. 5.

Upon the point that in any event the admission in evidence of the testimony of the witness Wilsey was not prejudicial we ask the Court to refer to the particularly well considered case of Adams v. Lawson, *supra.* In the case of Bailey v. Hyde, 3 Conn. at p. 467, which was an action for slander, the concluding paragraph of the opinion is as follows:

> "The defendant must render it reasonably apparent that justice has not been done him, and to such extent, that in the sound exercise of discretion, it is fit there should be a new trial. This in my judgment he has not done; and, therefore, his motion must be denied."

B. THERE WAS NO ERROR IN ADMITTING IN EVIDENCE ARTICLES APPEARING IN VARIOUS NEWSPAPERS THROUGHOUT THE UNITED STATES ON JULY 7 AND JULY 8, 1913, AND WHICH CONTAINED NOTICE OF MR. SULLIVAN'S CHARGES AGAINST THE CITY'S ENGINEERS RELATING TO THE SUPPRESSION OF DATA.

One of the features of the libellous publication, which counsel for defendants fail to take into consideration, is that of its utter blindness in the face of the wide publicity which had been given to activities of Sullivan and Aston characterized by the defendants as consisting in "gross and careless aspersions made upon the City of San Francisco, the army engineers and generally". The complaint alleges by way of inducement that

"at and prior to the time said bill came up for debate in the Senate of the United States, as aforesaid, considerable public attention and interest throughout the different parts of the United States had become centered upon the obviously great efforts that were being made by the agents and lobbyists maintained at Washington as aforesaid by said City of San Francisco in behalf of the passage of said bill and much public criticism had been and was indulged in between the months of June and December, 1913, by the press of the United States over and concerning the suppression from the Advisory Board of Army Engineers of the favorable report of the city engineer of said San Francisco, prepared in April, 1912, as aforesaid, showing the availability and adequacy of the Mokelumne source of water supply for said City of San Francisco; that said suppressed report was known to the press and the public of the United States as the 'Bartell Report' and the 'Bartell-Manson Report'; that the fact of the suppression of said report was first made public by and through the statements and communications made by the plaintiff as aforesaid and was first publicly testified to before the Committee on Public Lands of the House of Representatives by the said Eugene Sullivan on the 7th day of July, 1913, that no reference was made in said special Washington edition of said San Francisco Examiner by said defendants, Hearst and Examiner Printing Company, to said Bartell-Manson Report or to the fact of its suppression and the concealment thereof from the Advisory Board of Army Engineers by said City of San Francisco" (Trans. pp. 17, 18).

Defendants moved to strike this portion of the complaint under specifications Nos. 32 to 36 inclu-

sive (Trans. pp. 36, 37), which motion was denied upon proper authority.

The rule regarding the pleading of inducement has been stated in various ways:

> "Inducement should consist of such facts as authorize an inference against the right asserted by the other party."
>
> Egberts v. Dibble, Fed. Cas. No. 4307.

> "A plaintiff whose attacks are not wrongful per se, but which may be perfectly consistent with good faith and fair dealing, must aver and specify the facts giving to it a different character."
>
> Hughes v. Murdock, 45 La. Ann. 935; 13 So. 182.

See also

31 Cyc., 102.

We submit that the authorities urged by the defendant in support of this assignment are not in point. All the latter publications in other papers mentioned in the cases they cite have reference to a repetition of the alleged libellous matter. Here the matters contained in the newspapers in question go to explain the hidden meaning of the libel, and in no way do they bear prejudicially upon the defendants in reference to the truth or falsity of the libel charged or to the fact of publication or non-publication.

C. THERE WAS NO ERROR IN ADMITTING THE TESTIMONY OF THE WITNESS GRUNSKY THAT THE HYDE-MARKS-GRUNSKY REPORT ON THE ALAMEDA CREEK RUN-OFF WAS TURNED IN LATE.

Mr. Grunsky testified *on behalf of the defendants* on *direct examination* as follows:

> That during the years 1912 and 1913 he was asked by the Board of Supervisors to take charge of work that had been in progress in the city engineer's office by Mr. Manson, who was then city engineer, and who by reason of illness was for a time incapacitated; that in connection with this work he was asked by Mr. Freeman, who had been called in to take charge of the Water Supply Investigation of San Francisco to make a number of studies relating to quite a number of sources of supply, Eel River, Feather River, Yuba River, Stanislaus River, Mokelumne *and others,* as various possible sources of water, indicated by the Board of Army Engineers to the City as desirable of investigation; that he made use of the information that was in the city engineer's office, put a number of assistants at work and gathered the information together, formulated reports upon these various sources of supply *and finally submitted them to the Army Engineers;* that his investigation included what is known as the Mokelumne River and the properties of the Sierra Power & Water Company (Trans. pp. 334-335).

It was on cross-examination that the witness stated that this particular report was turned in late. *As a matter of fact it was not turned in to the Board of Army Engineers at all by him,* and upon rebuttal it was proved by Dr. Bade that it did not

reach Secretary Fisher until the hearing upon the show cause order, November 25-30, 1912; *and then only* upon the complaint of the representation of the Spring Valley Water Company that there was such a report in existence. The Court will bear in mind that the witness was an *engineering* expert called by defendants to justify their statements that plaintiff had cast "gross and careless aspersions, etc., etc.," upon the City of San Francisco, the Army Board of Engineers, and engineers generally. Whatever effect this fact may have had upon the jury, it was a proper effect because it was of the essence of the issue whether or not the city had been guilty of the suppression of engineering data as charged by Mr. Sullivan and Mr. Aston. It was proper on cross-examination after the testimony of Mr. Grunsky as stated above; and Dr. Bade's testimony in rebuttal, it seems to us, is conclusive of its admissibility (Trans. pp. 380-387).

D. THE COURT DID NOT ERR IN ADMITTING EITHER THE STATEMENTS OF WITNESSES PRESENT AT THE MEETING OF THE CIVIC CENTER LEAGUE ON NOVEMBER 5, 1913, WHERE THE PLAINTIFF MADE A PUBLIC STATEMENT OF HIS ESSENTIAL CHARGES AGAINST SAN FRANCISCO OF SUPPRESSION OF REPORTS, ETC., ETC.; NOR IN ADMITTING THE REPORT OF THE MEETING IN THE SAN FRANCISCO EXAMINER OF NOVEMBER 6, 1913.

The admission of the paper was clearly proper in support of the charge of malice, after laying the foundation of notice by the testimony of witnesses

as to the fact of Mr. Aston having made the charges. Again we are confronted with the question raised by the hidden significance of the libel. The defendants in this case cannot hide behind the vagueness of their charges of unprofessional conduct on the part of Mr. Aston, and state in general terms that he was guilty of fraud, and was engaged in lying and deceiving Congress and the general public, when they themselves were engaged in a self-centered and self-interested publication, as well as suppression, of facts, concerning the same subject matter, without having their purposes and intents called into question. At page 80, counsel for the defendants with considerable *naivete* suggest that

> "The very publication complained of (meaning the libel) arraigns and takes the plaintiff to task for making the kind of charges that he made at the Civic Center meeting. The defendants in the publication of December 2, 1913, charged the defendant with making gross and careless aspersions upon the City Engineer and other engineers representing San Francisco. The plaintiff, having brought suit against the defendants for publishing such an article, now claims the article was actuated by malice because the defendants throughout months preceding the publication of the article complained of had failed to permit the use of columns of their newspaper to give currency to the very charges for the making of which they arraigned him in the publication complained of."

We cannot find much to complain of in the foregoing when it is remembered that the article in the newspaper of November 6, 1913, shows the failure of the defendant, Printing Company, to perform its

duty to the public to furnish "a fair report" of the meeting in question, and where the publication of the libel in the partisan brief or "broad sheet", (for the special Washington edition of the San Francisco Examiner was not a newspaper in any sense of the term), shows a conscientious purpose on the part of its publishers to be faithful to the special objects and interests it sought to serve. The characterization given to the publication issued at Washington, D. C., in the complaint upon which issue was joined by general denials (Trans. pp. 49, 52), and the newspaper itself, which is in evidence as Plaintiff's Exhibit 10, show conclusively, it seems to us, that this assignment of want of relevancy must fall of its own weight.

But if the testimony was irrelevant for the purpose of showing malice, the error in admitting it was not prejudicial for the reason that the jury found in favor of the defendants on the issue of *exemplary* damages.

E. AND F. THE COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF THE WITNESS WILSEY AS TO THE OBJECTS FOR WHICH HE EMPLOYED MR. ASTON TO MAKE A REPORT ON THE MOKELUMNE RIVER PROPERTIES OF THE SIERRA BLUE LAKES WATER & POWER COMPANY. NOR DID IT ERR IN RECEIVING TESTIMONY THAT THE PROPERTIES OF THAT COMPANY WERE OF SUBSTANTIAL VALUE.

The libel directly charged that Sullivan and Aston were inspired to make their charges directly

because of their desire to unload "an opposition water supply" and that such a scheme was "a gross fraud"; and the latter imputation could only arise by reason of the worthlessness of the property. The sting of this libel so far as Mr. Aston is concerned lies in the charge that, as "Sullivan's man Aston" he would and did resort to lying and misrepresentation of engineering facts with this particular object in view.

Not only were Mr. Aston's motives worthy in every respect but he took infinite pains to see that his clients, Mr. Wilsey and his London and Paris associates, should not labor under any misapprehension concerning the value of these properties quite apart from any value they might have as a water supply for San Francisco. The evidence shows that he had two motives for his activities in this matter i. e.; *a public* one and a *private* one. The *public* one was dictated by a sense of duty *as an engineer* in possession of knowledge concerning a matter then of great public interest to the members of the most important public body in this country, i. e. Congress, and which involved the necessity to disclose trickery and chicanery. The *private* one arose out of consideration for the welfare not alone of his clients but of persons then interested, or who at any time in the future might desire to become interested, in a great hydro-electric, and water supply property in California: He knew not only of the suppression of a valuable engineering report on the Mokelumne River sources and of the fact that the

political agents and lobbyists of San Francisco had for years been slandering the Mokelumne River properties in the interest of obtaining the grant of the Hetch Hetchy Valley from the United States Government as the only adequate supply for the city, but he had definite knowledge of the fact that these properties had received a "black eye", by reason of the evil practices related, in the Investment World so far distant from San Francisco as London and Paris. Every instinct of loyalty to his profession prompted him, in so far as he was able, to act as he did in the premises. He was charged with self-interestedness from the start. He was said to be Sullivan's man who wanted to help Sullivan sell worthless water supply property to the city. The proof shows that *on the contrary,* he was employed by Wilsey to make a report for European clients, and that both Wilsey and Aston reported to the latter that they must get the idea of San Francisco wanting the Mokelumne sources out of their heads (Trans. pp. 289, 290). Aston's report was completed in July, 1913 (Wilsey's option expired in August). In this report, speaking of the suppression of the Bartel-Manson Report, Mr. Aston says:

> "However, even under the most favorable conditions it is extremely unlikely that the San Francisco authorities would purchase the Mokelumne properties for some time. *And the objections made against (the) city's actions have been those which one would naturally put forward in order to rehabilitate the value of their properties and overcome the effects of misrepresentations made regarding them"* (Trans. p. 298).

In a letter written to Mr. Scott Ferris, Chairman of the Public Lands Committee on July 8, 1913 (Mr. Sullivan had appeared before the House Committee on Public Lands on July 7, 1913, and Mr. Aston had read the account of his testimony as given by the local papers of that date), Mr. Aston says:

> "Now I have a great deal of sympathy with the proponents of the Mokelumne projects; if their bonds have deteriorated in value it is largely on account of misrepresentations made by the City Engineers regarding their project, and owing to the fact that more honest reports favoring them have been suppressed.
>
> "Eugene J. Sullivan is only a unit amongst many interested in this property, and these people, as it now turns out, have not been given a 'dog's chance'. A grave injustice has been done them in the various reports made against their properties, and in the suppression of a report favoring them. We therefore feel that a Commission should be appointed to take evidence in this matter, and that justice should finally be done. The public rely on your committee to see to this. I feel that what I say is right and I shall continue to fight for it."

How then can it be said that the objects for which he was employed by Mr. Wilsey to make the report in question, and the fact that the properties of the Sierra Blue Lakes Water and Power Company were of substantial value, were not relevant in corroboration of the worthy motives and aims which animated the plaintiff and which if true (*and the undisputed evidence showed them to be true*), negative the *intents, objects* and *purposes* stated in the libel.

G. THE COURT DID NOT ERR AS AGAINST MR. HEARST IN ADMITTING IN EVIDENCE COPIES OF THE SAN FRANCISCO EXAMINER OF NOVEMBER 30, AND DECEMBER 1, 1913, STATING THAT THE SPECIAL WASHINGTON EDITION WAS BEING PREPARED AND ISSUED UNDER HIS PERSONAL SUPERVISION AND DIRECTION.

We respectfully submit that counsel for the defendants have admitted themselves "out of Court" so far as this assignment is concerned. At pages 6, 7, 14, and in the argument on this assignment at pages 86 and 87, of their brief they admit that the evidence is sufficient to sustain the verdict against both defendants. Since the statements in the papers in question concerning Mr. Hearst's connection with the special Washington edition can only be regarded as cumulative evidence going to the admitted fact, there could be no prejudicial error involved here.

We will, however, state briefly the evidence which, in our judgment, caused defendants to omit their motion for a directed verdict in favor of Mr. Hearst and which prevents them from urging here any assignment that there is no evidence to sustain the verdict as to him.

The paper containing the libel, the Court will notice, carried a *fac-simile* reproduction of a letter of the Vice-President of the United States on the front page setting forth his position in respect to the pending bill before the Senate; and it also carried what purports to be signed interviews with a number of Senators and Congressmen indicating that they were in favor of San Francisco's application for the Hetch Hetchy Valley. The plaintiff directly solicited the testimony of some of these gen-

tlemen upon the fact as to whether or not Mr. Hearst had obtained these interviews personally, and Mr. Marshall, manifesting those fine qualities which characterize particularly an Indiana lawyer, was considerate enough to waive his privilege and give his deposition *de bene esse.* In his deposition he testified that he had furnished his written statement to Mr. John Temple Graves, at the latter's solicitation, and that "he had been informed and believed that in some way Mr. John Temple Graves is connected with the news enterprises of Mr. Hearst" (Trans. p. 308).

The plaintiff also called as a witness Mr. J. S. Dunnigan, Clerk of the Board of Supervisors of San Francisco, who stated that he knew Mr. Graves, that he was in Washington at the time of the publication of the special Washington edition of the San Francisco Examiner, and that he was working *in the Hearst office at the time the paper was published.* Now obviously in the face of such testimony the only way counsel could have exculpated Mr. Hearst would have been *to show that Mr. Graves was in the employ* of the defendant printing company. *This they did not offer to do.*

H. THE COURT DID NOT ERR IN ADMITTING IN EVIDENCE COPIES OF AFFIDAVITS SHOWING THAT MR. HEARST WAS THE OWNER OF MORE THAN ONE PER CENT OF THE STOCK OF THE SAN FRANCISCO EXAMINER, THE LOS ANGELES EXAMINER, THE ATLANTA GEORGIAN, THE CHICAGO EVENING AMERICAN, THE BOSTON AMERICAN AND THE NEW YORK EVENING JOURNAL.

When Mr. Marshall testified that John Temple

Graves was connected with the "news enterprises of Mr. Hearst"; and Mr. Dunnigan testified that Mr. Graves "was working in the Hearst office in Washington at the time the paper was published", the affidavits became relevant to identify and make definite Mr. Hearst's news enterprises and his connection with the publication of the libel through his personal agent Mr. Graves. As aptly stated in this connection by the trial judge, "a party is never put to the proof of his whole case by one witness".

These affidavits were also properly admissible to show the large scope of the defendant Hearst newspaper enterprises as bearing both upon a proper characterization of the special *"broad sheet"* published in Washington, the significance attaching to its circulation by Mr. Hearst, and the ability of Mr. Hearst to respond to damages in an amount proportionate to the gravity of the libel.

Evidence of the wealth of the defendant is always admissible in libel cases where punitive damages are demanded as was the case here.

Newell on Slander & Libel (3rd ed.), Sec. 1035, p. 1054;
Barclay v. Copeland, 74 Cal. 1;
Hayner v. Cowden, 27 Ohio St., 292;
Bennet v. Hyde, 6 Conn. 24;
Buckley v. Knapp, 48 Mo. 153;
Hosley v. Brooks, 20 Ill. 115;
Humphries v. Parker, 53 Me. 502;

Karney v. Paiseley, 13 Iowa 89;
Adcock v. Marsh, 30 N. C. 360;
Lewis v. Chapman, 19 Barb. 252.

We trust that we have shown the sufficient relevancy of this and other testimony which has variously been assigned as error, in support of the issues of malice and exemplary damages. Under none of these assignments may the defendants urge that the error was prejudicial, for the reason *that the verdict was for compensatory damages only.* The verdict in this case was not large taking into consideration the nature of the libel and the circumstances surrounding its publication. Another matter of prime consideration is the fact, shown by the recitals in the judgment, *that the defendants allowed the cause to go to the jury without argument on their part.* We respectfully represent that their action in this matter should weigh strongly against them in the consideration given by this Court to their assignments of error.

Throughout the trial in the Court below and here we have consistently tried to bear in mind the great dignity of this form of action in the economy of Anglo-American law. The English speaking people throughout the world have no greater cause for gratification than that their present state of civilized development is based upon their idea concerning the proper functions of government, which leaves no room for the intrusion of the power of the State in behalf of a regulation of relations between the individual and the State involving his

personal rights. We have no forms of action by the State relating to private rights. We are essentially *a self controlled people.* It is the genius of our institutions that our citizens, in the protection of their private rights, will ultimately cleanse and purify governmental policies, and check encroachments of arbitrary official action upon private rights, in private actions, moved thereto by their spirit of freedom and their love for democratic government.

In England today there is no form of action more commonly resorted to, than the action of libel. It was cause for gratification to read a few days ago press accounts of an action brought by an American gentleman in London who had been falsely charged with being a spy and divulging important information obtained while recently visiting the English army in France, and that General French appeared as a witness in his behalf; the case being settled out of Court immediately following the introduction of the latter's testimony.

We respectfully submit to the Court the examination of the whole record in this cause, firmly believing that it will find no prejudicial error therein warranting a reversal of the verdict and judgment.

Dated, San Francisco,
March 18, 1916.

JACOB M. BLAKE,
Attorney for Defendant in Error.